Supreme Court, U.S.
FILED
DEC 30 1971
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1972

No. ~~71~~ - 851

JOHN PAUL WRENN, Petitioner

V.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE NORTH CAROLINA COURT OF APPEALS

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January 1, 1972

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JOHN PAUL WRENN, Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

The petitioner, John Paul Wrenn, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals entered in this proceeding on August 4, 1971.

OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported in 12 N. C. App. 146, 182 S. E. 2d 600. The full text of the opinion of the Court of Appeals appears in Appendix B of this Petition.

JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on August 4, 1971. A timely Notice of Appeal was filed with the North Carolina Supreme Court on August 25, 1971 and was dismissed by the North Carolina Supreme Court on October 5, 1971. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Did the Trial Court err in permitting the State to introduce evidence which was seized pursuant to a search authorized by a search warrant, probable cause for the issuance of which was established through the use of evidence previously seized pursuant to an illegal search?

2. Did the Trial Court err in permitting the State to introduce evidence of incriminating statements made by Petitioner in the course of a search conducted pursuant to a search warrant, probable cause for the issuance of which was established through the use of evidence previously seized pursuant to an illegal search?

3. Did the Trial Court err in denying the Petitioner's motion to quash the indictment where a period of two years and six months passed between indictment and trial?

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. CONST. amend. IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. U.S. CONST. amend. VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. U.S. CONST. amend. XIV, 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On or about July 12, 1968, an agent of the North Carolina State Bureau of Investigation (Record Pages 23-24) entered the yard area behind Petitioner's apartment in the Town of Knightdale, North Carolina. (Record Page 4). The area entered was used as a vegetable garden (Record Page 27) and was "immediately behind" the apartment. (Record Page 4, 27). The S. B. I. Agent seized a portion of a plant from this area and took it to the S. B. I. Laboratory. (Record Page 19). Thereafter, the Laboratory advised the S. B. I. Agent that the material seized was marijuana. (Record Page 19).

On or about July 13, 1968, the S. B. I. Agent conveyed this information to S. B. I. Agent Haywood Starling (Record Page 18) who swore to an affidavit setting forth these facts (Record Pages 3-5) and procured the issuance of a search warrant (Record Pages 1-3) on July 15, 1968. Thereafter, pursuant to the warrant, Agent Starling and other law enforcement officers conducted a search of Petitioner's apartment and yard (Record Pages 14, 29, 55, 56) and seized material from inside the residence and from the backyard. (Record Pages 46-48, 50, 52, 55, 57). During the search, Petitioner made incriminating statements. (Record Pages 45, 48, 49, 53, 54). Subsequently, the material seized was identified as marijuana.

Petitioner was indicted for the crime of illegal possession of a narcotic drug on July 29, 1968 (Record Pages 7-8) and was brought to trial in the Superior Court of Wake County, North Carolina, on February 1, 1971. (Record Page 9).

At the trial, Petitioner's motion to quash the indictment was denied. (Appendix A and Record Page 13). During the trial, the State was permitted to introduce, over Petitioner's objection, evidence of the materials seized (Appendix A and Record Pages 29, 41, 48, 55, 56) and statements made by Petitioner during the search. (Appendix A and Record Pages 45, 48-49, 53-54).

Petitioner was found guilty and sentenced to a term of one (1) to two (2) years in the State Prison. (Record Page 10).

Petitioner entered appropriate exceptions and appealed to the North Carolina Court of Appeals, assigning as error the denial of his motion to quash (Appendix A and Record Page 64, Assignment No. 4), the admission of evidence concerning the materials seized (Appendix A and Record Page 64, Assignment No. 5) and the admission of evidence of statements made by him during the course of the search. (Appendix A and Record Page 64, Assignment No. 6).

By opinion dated August 4, 1971, the North Carolina Court of Appeals found no error and affirmed Petitioner's conviction. (Appendix B).

On August 25, 1971, Petitioner filed a timely Notice of Appeal to the North Carolina Supreme Court, alleging the presence of substantial constitutional questions identical to those set forth in this Petition. By Motion filed on September 7, 1971, the Attorney General of North Carolina moved to dismiss Petitioner's Appeal, alleging that it did not present any substantial constitutional question. By Answer filed on September 13, 1971, Petitioner responded to the Motion to Dismiss, reiterating his contention respecting the three questions set forth in this Petition. By Order dated October 5, 1971, the North Carolina Supreme Court allowed the Motion to Dismiss, without opinion.

REASONS FOR GRANTING THE WRIT

I. THE SEARCH QUESTION. REVIEW OF THE QUESTION OF THE LEGALITY OF THE SEARCH IS IMPORTANT BECAUSE THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS DIRECTLY CONTRARY TO DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER APPELLATE COURTS.

In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the Government sought to subpoena documents which it had theretofore illegally seized and returned as directed by the Court. Defendants were adjudged in contempt for failing to comply with the subpoena. The Supreme Court reversed the convictions, holding that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be

used at all." Id. at 391-92.

The principle of Silverthorne has been applied by Federal and State Courts in cases involving the use of illegally obtained evidence to establish probable cause for the issuance of a search warrant. See, e.g., Fraternal Order of Eagles, No. 778 v. United States, 57 F. 2d 93 (3d Cir. 1932) (original entry gained by false representation); United States v. Bush, 172 F. Supp. 818 (E.D. Tenn. 1959) (original entry gained by false representation); United States v. Mitchneck, 2 F. Supp. 225 (M.D. Penn. 1933) (original entry gained by false representation); Davidson v. Mississippi, 240 So. 2d 463 (Miss. 1970) (original entry gained by trespass); People v. Carswell, 149 Cal. App. 2d 395, 308 P. 2d 852 (1957) (original entry gained by consent of one having no authority to consent).

In the instant case, a law enforcement officer went into Petitioner's back yard and seized a portion of a growing plant. The area entered was within the constitutionally protected curtilage of Petitioner's home. State v. Frizzelle, 243 N.C. 49, 89 S.E. 2d 725 (1955); State v. Twitty, 2 N.C. 102 (1794). When chemical analysis revealed that the material was marijuana, the officer took the material to Agent Starling of the State Bureau of Investigation. (Record Page 18). Prior to this time, Agent Starling had not discussed the matter with the officer who obtained the material, had not told him to obtain it and "had no evidence or information that it was growing there." (Record Page 18). Thereafter, Agent Starling went to Petitioner's premises and observed the yard from the street. (Record Page

23). This was "only after the marijuana was given to [him] by the police officer." (Record Page 23). On going to the premises, Agent Starling "did not feel like [his] visual observation was enough to cause [him] to go on in and take the plant." (Record Page 23).

If the circumstances surrounding the original entry onto Petitioner's premises were such as to justify the search and seizure, the State had the burden of showing the existence of such circumstances. Chimel v. California, 395 U.S. 752 (1969). Here, the State offered no such justifying circumstances, did not present the officer as a witness, did not identify him by name and admitted that he was a law enforcement officer only on cross-examination of Agent Starling during the voir dire. (Record Pages 23-24).

The affidavit made by Agent Starling to obtain a search warrant for Petitioner's premises recited, with some inconsistencies, the facts set forth above. Probable cause for the warrant was established only by this information. The other "fact" set forth in the affidavit was that Petitioner "had illegally held marijuana in his possession on two occasions during the period between July 1st, 1968 and July 14, 1968." (Record Page 4). Apparently, this information was gained as a result of the original discovery since, prior to that time, Agent Starling had no information about Petitioner. In addition, the fact of possession, without information as to where it was possessed and when it was possessed and how the informant knew about it would not justify a search warrant for the premises. Spinelli v. United States, 393 U.S. 410 (1969); Aguillar v. Texas, 378 U.S. 108 (1964).

Petitioner has advanced this position through the trial and state appellate court process, relying on Silverthorne, and its progeny. Neither of the North Carolina Appellate Courts has considered it. The North Carolina Court of Appeals did not discuss the principle of Silverthorne and, in its opinion, stated Petitioner's contention as being "that no probable cause for issuance of the search warrant is set out in the affidavit." (Appendix B). The Petitioner contended there and contends here that probable cause for issuance of the warrant was established through the use of evidence illegally obtained.

The North Carolina Court of Appeals conclusion that the search was proper and the North Carolina Supreme Court's dismissing Petitioner's appeal as not involving a substantial constitutional question leave citizens and law enforcement officers, in North Carolina and elsewhere, in doubt as to appropriate means for acquiring information on which to establish probable cause for issuance of search warrants.

II. THE CONFESSION QUESTION. REVIEW OF THE ADMISSIBILITY OF PETITIONER'S STATEMENTS DURING THE SEARCH IS IMPORTANT BECAUSE THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS DIRECTLY CONTRARY TO DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER APPELLATE COURTS

In Wong Sun v. United States, 371 U.S. 471 (1963), statements made by a defendant following an illegal entry into his premises were held inadmissible at the trial. Relying on the principle of Silverthorne Lumber Co. v. United States, supra,

the Court held that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest. . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." Wong Sun v. United States, supra at 485-86.

In the instant case, Agent Starling read the search warrant to Petitioner at Petitioner's door. The following then occurred, in the words of Agent Starling: "He asked me something to the effect of what do other people do in similar circumstances. I told him some talk and some did not. To that, in substance he said well, I guess I may as well talk." (Record Pages 31, 33-34). Deputy Lester W. Kelly of the Wake County Sheriff's Department, testified: "After he was advised of his rights and this conversation had taken place, and after the search warrant was read to him, he said something to the effect that he might as well show us where it is." (Record Page 35).

It is clear that the Petitioner's statements were the "fruit" of the search and if, as contended above, the search was illegal, Petitioner's statements were inadmissible.

The Attorney General of North Carolina conceded in his brief in the North Carolina Court of Appeals, "that if the search was illegal then these statements would be inadmissible."

The North Carolina Court of Appeals correctly stated Petitioner's contention respecting this issue and noted: "We have held the search warrant

valid; therefore, this assignment of error is overruled without further discussion." (Appendix B).

Resolution of the search warrant question logically includes resolution of the instant question. Review of both questions is appropriate in order to conclusively determine the legal effect of the law enforcement officer's original entry onto Petitioner's premises.

III. THE SPEEDY TRIAL QUESTION. REVIEW OF THE QUESTION OF WHETHER PETITIONER WAS DENIED A SPEEDY TRIAL IS IMPORTANT BECAUSE IT RAISES SUBSTANTIAL UNSETTLED ISSUES RESPECTING THE NATURE OF THE RIGHT.

In Klopfer v. North Carolina, 386 U.S. 213 (1966), the Supreme Court held the speedy trial provision of the Sixth Amendment to the United States Constitution applicable to a criminal defendant in a State Court, declaring it to be "one of the most basic rights preserved by our Constitution." Id. at 226. This declaration was reiterated in Smith v. Hooey, 393 U.S. 374. (1969), where the right was held applicable to one incarcerated on another charge.

It has generally been held that the right to a speedy trial must be invoked by a demand for trial. See, e.g., Pietch v. United States, 110 F. 2d 817 (10th Cir. 1940); United States v. Lustman, 258 F. 2d 475 (2d Cir. 1958), cert. denied, 358 U.S. 880.

The requirement of a demand, however, is contrary to the usual rule respecting the operation of constitutional rights. In Johnson v. Zerbst, 304 U.S. 458 (1938), it was held that an accused need not demand counsel in order to invoke the right to counsel since "'courts indule every reasonable presumption against waiver' of fundamental constitutional rights and... 'do not presume acquiescence in the loss of fundamental rights.'" Id. at 464-65; accord, Bargett v. Texas, 389 U.S. 109 (1967); Carnley v. Cochran, 369 U.S. 506 (1961). In Carnley v. Cochran, supra, the Court held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Id. at 516. A similar result was reached in Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1936), which involved the right to trial by jury.

In the instant case, there was a lapse of two and one-half years between indictment and trial. This passage of time made it difficult for the witnesses, particularly Agent Starling, to recall clearly the circumstanes surrounding issuance of the warrant. (Record Page 19). The record is silent as to any reason for the delay and the North Carolina Court of Appeals thought this fact determinative: "so far as we can tell the delay may have been at defendant's requests." (Appendix B).

If the right to a speedy trial is "as fundamental as any of the rights secured by the Sixth Amendment", Klopfer v. North Carolina, supra at 223, should waiver of the right be presumed from a silent record?

The instant case affords an opportunity for the Court to clarify the demand doctrine in light of the decisions in Klopfer v. North Carolina, supra and Smith v. Hooey, supra.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the North Carolina Court of Appeals.

Respectfully submitted,

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January 1, 1972

APPENDIX A

EXCERPTS FROM RECORD INDICATING QUESTIONS RAISED BELOW

[From Record Page 13]

Upon the defendant's being arraigned, and prior to his entry of a plea of not guilty, he moved to quash the indictment.

MOTION DENIED. EXCEPTION

EXCEPTION NO. 1

[From Record Page 14]

[Haywood R. Starling was called as a witness for the State and testified as follows:]

I am Mr. Haywood R. Starling and am employed by the State Bureau of Investigation.

* * *

On July 15, 1968, I did have occasion to go to the residence of Mr. John Paul Wrenn, the defendant, in Knightdale. I do not recall the precise street. Someone was with me at this time and I went there for the purpose of serving a search warrant on John Paul Wrenn. I did serve the search warrant on the defendant; John Paul Wrenn.

Q. As a result of serving this search warrant what, if anything, did you recover?

MR. CHURCHILL: [Attorney for Defendant - Petitioner, Wrenn] Objection to that and move to suppress.

COURT: All right, sir. I assume that this voir dire will take some fifteen or twenty minutes?

[From Record Page 29]

* * * *

(The court then ruled that the search warrant introduced into evidence as State's Exhibit 1 is a valid search warrant and denied the defendant's motion to suppress.)

EXCEPTION. EXCEPTION NO. 2

[From Record Page 30]

[Haywood R. Starling testified, as a witness for the State, as follows:]

When I arrived at the Wrenn dwelling, I knocked on the door and the defendant, Mr. Wrenn, came to the door and at that time I identified myself to him with my credential and badge. At that time, I told him that I had a search warrant for his residence to search for marijuana. I read the warrant to him. After that, I advised him of his rights against self-incrimination. As to what rights I advised him of at this time, I told him he did not have to make a statement to me at all; that any statement that he did make to me could be used as evidence in court against him; that if he did not have the money to hire an attorney, that one would be hired -- that one would be appointed for him and that if he did elect to talk with me that he could discontinue talking with me at any time that he desired. I asked him if he understood what I had told him.

Q. What, if anything, did he say?

MR. CHURCHILL: Objection and move to suppress.

[From Record Page 45]

* * * *

[Following a voir dire, the Trial Court made certain findings of fact, concluding as follows:]

Therefore, it is adjudged that the defendant, John Paul Wrenn's answers and statements to Haywood R. Starling, Special Agent of the State Bureau of Investigation and Lester W. Kelly, Deputy Sheriff of Wake County, are competent evidence and that the officers will be permitted to testify accordingly. You may call the jury in.

EXCEPTION. EXCEPTION NO. 3

[From Record Page 45]

[Haywood R. Starling testified, as a witness for the State, as follows:]

I testified that Mr. Wrenn came to the door when I went to the front door of his home. When he came to the door, I identified myself to him and stepped inside of the door. It could be that I asked to come in first and then identified myself. I don't recall the order but I then immediately read a search warrant to him and advised him of his rights against self-incrimination and asked him if he understood. He said that he did and then I began asking him some questions. At the time I read the search warrant, I did inform him of what I was looking

for. After I advised him of his rights, he did say something in response.

Q. What, if anything did he say to you?

MR. CHURCHILL: Your Honor, we renew the previous objection and move to suppress.

COURT: Objection sustained. Motion to suppress the evidence is denied. Now you may proceed.

EXCEPTION. EXCEPTION NO. 4

The defendant then asked me what do other people do in similar circumstances or that question in substance, if not precisely the words and my answer to him was well some talk

[From Record Page 46]

to us and some do not but you do whatever you want to do. In response, he said--he told me that he might as well talk then. He might not have said it in those precise words but that was the substance.

As to what he said to me then, I began asking him questions and he responded to them. As a result of this questioning, I immediately informed him that we were looking for marijuana and would like for him to cooperate and tell us if he had some in the house and just show us where it was at, that we would likely find it either way and he led us on upstairs, that is Mr. Kelly and myself and there pointed out some--

MR. CHURCHILL: Your Honor, I object, renew the objection made as to the illegal and

unreasonable search and seizure and move to suppress.

COURT: Denied.

EXCEPTION. EXCEPTION NO. 5

[From Record Page 48]

[Haywood R. Starling testified, as a witness for the State, on direct examination, as follows:]

Q. As a result of looking in the back yard what, if anything, did you do?

MR. CHURCHILL: Object and move to suppress on the grounds of illegal and unreasonable search and seizure.

COURT: Objection sustained. Motion is denied. Go ahead.

EXCEPTION. EXCEPTION NO. 8

A. I pulled up some suspected marijuana plants.

OBJECTION: OVERRULED. EXCEPTION.

EXCEPTION NO. 9

* * * *

Q. All right; you testified that you advised the defendant of his constitutional rights?

A. I did, sir.

Q. And then you asked him if he understood those rights?

A. Yes sir.

Q. And what did he say in response to that?

A. Well he then told me that he did have marijuana--

OBJECTION: OVERRULED. EXCEPTION. EXCEPTION NO. 10

A. --in the house and I asked him had he been using it himself or been selling it or making it available to others and he said,

[From Record Page 49]

"No," that only he and his wife used it occasionally at parties at the house and he further told me in answer to my question, "Where did you get the seed?" He said, that he got the seed in Philadelphia in a vacant field during 1966 and about reading an article in the paper in Philadelphia about a field of marijuana being found there in Philadelphia. He later brought this seed to Raleigh and planted it here in Wake County.

I don't recall whether it was at this time that we proceeded upstairs. Some of those statements might have been made while we were coming down from upstairs but it was all within a very few minutes of time. It was at this time that he pointed the bag out in the closet to me.

Q. And did he indicate in any way as to whom this bag and its contents belonged at that time?

OBJECTION: OVERRULED. EXCEPTION. EXCEPTION NO. 11

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[From Record Page 53]

S

Q. What, if anything, did he tell you in

[From Record Page 54]

regard to those plants in the back yard that you had pulled up?

MR. CHURCHILL: Objection.

COURT: Overruled.

EXCEPTION. EXCEPTION NO. 12

[From Record Page 55]

[Jim Anthony was called as a witness for the State and testified, on direct examination, as follows:]

I am Jim Anthony of the Wake County Sheriff's Department. On the 15th of July, 1968 I did have occasion to accompany Mr. Starling, Mr. Kelly and other officers to the home of Mr. Wrenn in Knightdale. I had occasion to go in the back yard behind the home at this time.

Q. Did you have occasion at that time to take into your possession certain plants that you found?

MR. CHURCHILL: Objection on the same grounds; illegal and unreasonable search and seizure.

COURT: Overruled.

EXCEPTION. EXCEPTION NO. 14

[From Record Page 56]

[Ralph Keaton was called as a witness for the State and testified, on direct examination, as follows:]

My name is Ralph Keaton. I am a special agent with the State Bureau of Investigation employed as a forensic chemist.

****

On the 15th of July, 1968, I had occasion to go to the residence of John Paul Wrenn in Knightdale. I went there for the purpose of observation. I went with the Director of the Bureau to observe what was taking place at this time. I had occasion to see Mr. Starling there. I had occasion to see Mr. Anthony there.

Q. Did you have occasion to observe any plants being removed from the back yard of this residence?

MR. CHURCHILL: Objection and move to suppress; illegal and unreasonable search and seizure.

COURT: Denied. Objection is overruled and motion to suppress is denied.

EXCEPTION. EXCEPTION NO. 15

A. Yes sir, I did observe them remove the plant.

[From Record Page 57]

****

I made an examination of the vegetable material that I found in this bag that was delivered to me by Mr. Starling. I examined the material grossly, visually, after which I examined it microscopically and conducted a Duquenois test and Hydrochloric acid test of the material.

Q. Based on your examination of the materials that you found in the bag itself do you have an opinion satisfactory to yourself as to whether or not the materials in the bag contained the drug marijuana?

OBJECTION: OVERRULED. EXCEPTION. EXCEPTION NO. 17

A. Yes, sir, I do.

[From Record Page 58]

Q. What is your opinion?

A. The bag did contain marijuana.

I weighed the material that I found in the bag.

Q. And what did it weigh out at?

OBJECTION: OVERRULED. EXCEPTION. EXCEPTION NO. 18

A. The total vegetable material was 154 grams.

* * * *

Q. Based upon your examination of the plants at that time do you have an opinion satisfactory to yourself as to whether or not the plants contained the drug marijuana?

OBJECTION: OVERRULED. EXCEPTION. EXCEPTION NO. 19

A. Yes sir, I do.

Q. What is your opinion?

A. The ten plants which they delivered to

[From Record Page 59]

me were each marijuana plants.

Q. Did you have occasion to weigh the ten plants at this time?

A. Yes sir, I did.

Q. What was the weight of the ten plants?

OBJECTION: OVERRULED. EXCEPTION. EXCEPTION NO. 20

A. Total weight of the plants was two pounds and five ounces or 1036 grams.

[From Record Page 64]

[On Appeal, the Petitioner grouped his exceptions and assigned error as follows:]

* * * *

4. ASSIGNMENT NO. 4

The court erred in denying the defendant's motion to quash the indictment.

EXCEPTION NO. 1 (R p 13)

5. ASSIGNMENT NO. 5

The court erred in denying the defendant's motion to suppress evidence obtained in the course of the search of defendant's premises, and in overruling the defendant's objections to the admission of such evidence, for that the search and seizure was illegal.

EXCEPTION NOS. 2 (R p 29), 5 (R p 41), 8 (R p 48), 14 (R p 55), 15 (R p 56), 9 (R p 48)

6. ASSIGNMENT NO. 6

The court erred in denying the defendant's motion to suppress evidence of incriminating statements made by the defendant, and in overruling the defendant's objections to such evidence, for that such statements were illegally

obtained from the defendant.

EXCEPTIONS NOS. 3, 4 (R p 45), 10 (R p 48),

APPENDIX B

TEXT OF OPINION BELOW

No. 7110SC410 Tenth District

NORTH CAROLINA COURT OF APPEALS
Spring Session 1971

STATE OF NORTH CAROLINA

v. From Wake

JOHN PAUL WRENN

APPEAL by defendant from Brewer, Judge, 1 February 1971 Session of Superior Court held in Wake County.

Defendant was charged in a bill of indictment, proper in form, with the felony of possession of the narcotic drug marijuana.

State's evidence tended to show the following: On 15 July 1968 defendant resided in a duplex apartment in Knightdale. On that date law enforcement officers served a search warrant on defendant at his residence for the purpose of searching for marijuana. Defendant led the officers to an upstairs bedroom and pointed out vegetable material in a bowl and some in a bag. The contents of this bowl and bag were identified by a chemist as 154 grams of marijuana. During the course of the search marijuana plants were found growing in defendant's back yard.

Defendant offered no evidence.

From a verdict of guilty of possession of marijuana in excess of one gram, and a prison sentence of not less than one nor more than two years, defendant appealed.

Attorney General Morgan, by Trial Attorney Cole, for the State.

Tharrington & Smith, by Roger W. Smith, for the defendant.

BROCK, JUDGE

Defendant argues much of his assignments of error as though he had been charged and convicted under G.S. 90-111.1 of the felony of growing marijuana. Defendant was charged and convicted of the felony of possession of marijuana under G. S. 90-88.

Defendant assigns as error that no probable cause for issuance of the search warrant is set out in the affidavit. Defendant relies upon the requirements of G. S. 15-25.1 prior to its repeal and rewirte in 1969, and relies upon our decision in State v. Milton, 7 N.C. App. 425, 173 S.E. 2d 60. The search warrant in the instant case was issued while G.S. 15-25.1, cited above, was in effect. However, the affidavit in this case passes the tests which the affidavit in Milton failed to pass. In the present case the affiant observed marijuana plants growing in defendant's back yard. This alone justified a finding of probable cause to issue the search warrant. The evidence on voir dire only serves

to strengthen the probable cause. This assignment of error is overruled.

Defendant assigns as error that statements made by defendant to the officers should have been excluded as "fruits of an illegal search". We have held the search warrant valid; therefore, this assignment of error is overruled without further discussion.

Defendant assigns as error that the trial judge denied his motion to quash the indictment. The minutes of the Court show the following: "2/1/71 Upon the calling of this case for trial, defendant through counsel, Carl Churchill, made a motion to quash the bill of indictment. Motion denied." The Record on Appeal discloses no grounds for the motion, nor any evidence in support of any grounds to quash the indictment. For the first time, in his brief, defendant undertakes to argue that the indictment should be quashed because he was denied a speedy trial. From the Record on Appeal we can see that defendant was arrested on 15 July 1968, the same date the search warrant was issued, and that defendant was tried in February 1971. This passage of time standing alone shows no prejudice to defendant; so far as we can tell the delay may have been at defendant's requests. This assignment of error is overruled.

Upon an examination of the entire record we conclude that defendant had a fair trial, free from prejudicial error.

No Error.

JUDGES MORRIS and HEDRICK concur.

APPENDIX C

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

JOHN PAUL WRENN

No. 106, Fall Term 1971

****

Appeal Docketed	25 August 1971
Motion to Dismiss Appeal	7 September 1971
Order Dismissing Appeal	5 October 1971
Final Judgment Entered	2 November 1971

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above-entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit the filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 22nd day of December, 1971.

ADRIAN J. NEWTON
Clerk of the Supreme Court of
North Carolina

APPENDIX D

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No: _____, January Term, 1972

JOHN PAUL WRENN, Petitioner

V.

STATE OF NORTH CAROLINA, Respondent

The Clerk will enter my appearance as Counsel for the Petitioner:

Wade M. Smith

WADE M. SMITH
835 Insurance Building
Raleigh, N. C. 27601

The Clerk is requested to notify counsel of action of the Court by means of Airmail Letter.

The person to be notified for Petitioner is:

WADE M. SMITH
835 Insurance Building
Raleigh, North Carolina 27601

APPENDIX E

CERTIFICATE OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. _____, January Term, 1972

JOHN PAUL WRENN, Petitioner

V.

STATE OF NORTH CAROLINA, Respondent

I hereby certify that on this 1st day of January, 1972, three copies of the Petition for Writ of Certiorari were personally delivered to Robert Morgan, Attorney General of North Carolina and H. A. Cole, Jr., Trial Attorney, Justice Building, Raleigh, North Carolina, for the Respondent, the State of North Carolina. I further certify that all parties required to be served have been served.

Wade M. Smith

WADE M. SMITH
835 Insurance Building
Raleigh, North Carolina 27601
Counsel for Petitioner

J. HAROLD THARRINGTON
Counsel for Petitioner

ROGER W. SMITH, of counsel

Supreme Court, U. S.
FILED
MAR 14 1972
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1972

No. 71-851

JOHN PAUL WRENN,
Petitioner,

V

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT MORGAN
Attorney General of North Carolina

H. A. COLE, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1972

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JOHN PAUL WRENN,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner, was recently tried and convicted of the felony possession of marijuana in the Wake County Superior Court Division of the General Court of Justice of the State of North Carolina, 68-CR-234. From the imposition of sentence petitioner gave notice of appeal to the Court of Appeals of North Carolina wherein Judgment was affirmed (No. 711OSC410) *State v. John Paul Wrenn*. Petitioner then filed a Petition for a Writ of Certiorari in the Supreme Court of North Carolina, which was denied by order of the Court in conference on October 5, 1971. (No. 106, Fall Term 1971).

From the Judgment below, petitioner has filed this petition for a Writ of Certiotari to the North Carolina Court of Appeals in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C., Sec. 1257(3).

QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF EVIDENCE WHICH WAS OBTAINED PURSUANT TO A SEARCH AUTHORIZED BY A SEARCH WARRANT?

II. DID THE TRIAL COURT ERR IN PERMITTING THE INTRODUCTION OF EVIDENCE OF STATEMENTS MADE BY THE PETITIONER DURING THE COURSE OF THE SEARCH?

III. DID THE TRIAL COURT ERR IN DENYING THE PETITIONER'S MOTION TO QUASH THE INDICTMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

1. *U. S. CONST. amend. IV:*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. *U. S. CONST. amend. VI:*

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. *U. S. CONST. and XIV, 1:*

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The petitioner, John Paul Wrenn, was charged in a bill indictment with illegal possession of a narcotic drug, marijuana. Petitioner was tried at the February 1 Special Session, 1971, of the Wake County Superior Court before His Honor Coy E. Brewer, Judge Presiding, and a jury.

Upon being arraigned, petitioner moved to quash the warrant. This motion was denied. At the close of the evidence for the State, petitioner moved for a Judgment as of nonsuit. This motion was denied. The petitioner offered no evidence and renewed his motion for Judgment as of nonsuit. This motion was denied.

This case was then submitted to the jury and a verdict was returned by the jury finding the petitioner guilty as charged. The petitioner's motions to set aside the verdict and for a new trial were denied.

Judgment was entered by the Court that the defendant be imprisoned for a term of not less than one year or more than two years in the State Prison with a recommendation this term of imprisonment be served under the work release program. The petitioner thereupon gave notice of appeal to the North Carolina Court of Appeals in open court.

By opinion dated August 4, 1971, the North Carolina Court of Appeals found no error and affirmed petitioner's conviction.

On August 25, 1971, petitioner filed with the North Carolina Supreme Court made Petition for Writ of Certiorari to the North

Carolina Court of Appeals. The petition of the petitioner was denied by the Supreme Court of North Carolina in conference on the 5th day of October, 1971.

Petitioner has now filed a Petition for a Writ of Certiorari in this Court to review the order of the North Carolina Court of Appeals (No. 711OSC410, dated August 4, 1971).

STATEMENT OF FACTS

On July 15, 1968, defendant resided in a duplex apartment in Knightdale, North Carolina. On that date law enforcement officers served a search warrant on the defendant at his residence for the purpose of searching for marijuana. Defendant lead the officers to an upstairs bedroom and pointed out vegetable material in a bowl and some in a bag. The contents of this bowl and bag were identified by a chemist as 154 grams of marijuana. During the course of the search marijuana plants were found growing in defendant's backyard..

ARGUMENTS

I. *THE SEARCH QUESTION*

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE EVIDENCE WHICH WAS SEIZED PURSUANT TO A SEARCH AUTHORIZED BY A SEARCH WARRANT.

Petitioner here contends that probable cause for issuance of the search warrant was established through the use of illegally obtained evidence. This contention cannot be sustained.

The constitution prohibits only those searches and seizures which are unreasonable. *Carroll v. United States*, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280; *Elkins v. United States*, 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437. "Furthermore, under circumstances requiring no search, the constitutional immunity never arises. This principle is aptly stated in 47 Am. Jur. Searches and Seizures, Sec. 20 as follows: 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search.

It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand.'" *State v. Colson*, 274 N. C. 295, 163 S. E. 2d 376, *cert. den.* 393 U. S. 1087, 21 L. Ed. 2d 780, 89 S. Ct. 876. The plain sight doctrine allows the seizure of objects in plain sight of the officer if he has a right to be in a position to see them. *Harris v. United States*, 390 U. S. 234, 236 (1968); *Kerr v. California*, 374 U. S. 23 (1963).

In the case at hand, Agent Starling testified on *voir dire* that he observed the marijuana growing behind the defendant's premises without making an entry upon the land (R.p. 16). He testified that an informant delivered the suspected marijuana to him (R.p. 16); that the informant was a police officer (R.p. 22); that he did not anticipate that the informant was going to obtain it and that he did not tell the informant to obtain it (R.p. 18); that some of the plants were 4 feet tall (R.p. 21); that one informant told him that he had observed certain activity around the plants (R.p. 21); that he was standing some 20 to 30 feet from the plants on a public street and sidewalk and could observe the plants from there (R.pp. 22-23). Thus, the petitioner has no standing to object inasmuch as the State's evidence indicates that the suspected marijuana plants could be seen from a public street and sidewalk and was in fact seen from the street and sidewalk. Therefore, no search warrant would be needed to seize the plants. The probable cause for the issuance of the search warrant was fully and lawfully shown in the affidavit and on the *voir dire* and would certainly pass the scrutiny of *Spinelli v. United States*, 393 U. S. 410 (1969) and *Aguillar v. Texas*, 378 U. S. 108 (1964).

II. *THE CONFESSION QUESTION*

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF INCRIMINATING STATEMENTS MADE BY THE PETITIONER DURING THE COURSE OF THE SEARCH.

Petitioner contends that certain incriminating statements made by him to the arresting officer should be excluded since they were obtained from the petitioner as a result of an illegal search. The State concedes upon the authorities set out in petitioner's brief,

that if the search was illegal then these statements would be inadmissible. However, the State again asserts that the search warrant is valid and incorporates herein the arguments set forth in its first argument in support thereof.

III. *THE SPEEDY TRIAL QUESTION*

THE TRAIL COURT DID NOT ERR IN DENYING THE PETITIONER'S MOTION TO QUASH THE BILL OF INDICTMENT.

Petitioner assigns as error that the trial judge denied his motion to quash the indictment. The minutes of the Court show the following: "2/1/71 Upon the calling of this case for trial, defendant through counsel, Carl Churchill, made a motion to quash the bill of indictment. Motion denied." The Record on Appeal discloses no grounds for the motion, nor any evidence in support of any grounds to quash the indictment. For the first time, in his brief, petitioner undertakes to argue that the indictment should be quashed because he was denied a speedy trial. The Record on Appeal shows that petitioner was arrested on 15 July 1968, the same date the search warrant was issued, and that petitioner was tried in February 1971. This passage of time standing alone shows no prejudice to petitioner; so far as you can tell the delay may have been at petitioner's requests.

Prior to *Klopfer v. North Carolina*, (involves the right of a defendant to demand trial after state takes a *nolle prosequi*), 386 U. S. 213 (1966), it seems clear that in order for a defendant to take advantage of a long delay between arrest and trial, he must show that he had demanded trial, that actual prejudice resulted from the delay, and that the delay was deliberately caused by the government. After *Klopfer*, this Court has ruled in *Smith v. Hooey*, 393 U. S. 374 (1969), that upon a request by a prisoner incarcerated in another state, a state with a pending charge must seek to secure his presence for trial where prisoner will not contest extradition, and a delay of six years is unreasonable. Also, in *Dickey v. Florida*, 398 U. S. 30 (1970), this Court held that upon a request by a federally incarcerated defendant, a state with a pending charge against defendant must attempt to secure his presence for trial, and a delay of 7 years was too long. Thus, these two holdings do not

seem to have changed previous requirements inasmuch as these cases only require a state with a pending charge to do more than file a detainer after a defendant has made an initial demand for trial. When a request is filed the state must make reasonable efforts to secure custody.

Thus the *Klopfer and Smith* cases cited by the petitioner are readily distinguishable from the case at hand and cannot be relied on as precedent in a factual situation as presented by petitioner's case.

CONCLUSION

The respondent respectfully requests that for the above reasons that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT MORGAN
Attorney General of
North Carolina

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Assistant Attorney General

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Raleigh, North Carolina 27611

Telephone (919) 829-3316

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of March, 1972, three copies of the Answer to the Petition for Writ of Certiorari were personally delivered to Wade M. Smith, Counsel for Petitioner, 835 Insurance Building, Raleigh, North Carolina 27601, J. Harold Tharrington, Counsel for Petitioner, and Roger W. Smith, of counsel, for the Petitioner John Paul Wrenn.

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North Carolina

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